Buffalo Law Review

Volume 49 | Number 2 Article 9

4-1-2001

A New Legal Realism for Criminal Procedure

Robert Weisberg
Stanford University

BOOK REVIEW

A New Legal Realism for Criminal Procedure

ROBERT WEISBERG†

Marc Miller and Ronald Wright have produced perhaps the most original criminal procedure book[1] in many years, because it departs more than any other casebook from the conventional model of building all material around United States Supreme Court cases.

American criminal procedure law is a fairly recent academic enterprise tending to focus on the Warren Court's supposed revolution in using the Fourth, Fifth, and Sixth Amendments as new constraints on prosecutorial and police power.[2] Focus on Supreme Court cycles has "typecast" American criminal procedure in terms of measuring and evaluating the Warren Court's jurisprudence and the Court's supposed retreat from it.[3] We often speak of the Warren era as if it were a long, major phase in our history, but it was not long after the retirement of Earl Warren that scholars started narrating, lamenting, or occasionally approving the perceived demise of his Court's jurisprudence.[4] Though many scholars have noted that the

† Edwin E. Huddleson, Jr. Professor of Law, Stanford University

1. *See* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS (1998).

2. *E.g.*, A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. Rev. 249 (1968).

3. *See* Robert Weisberg, *Foreword: Some Versions of the Skeptical*, 76 J. CRIM. L. & CRIMINOLOGY 832 (1985).

4. *See, e.g.*, Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 1512 (1980); Carol S.

Supreme Court's shift from due process to crime control caselaw has been much misunderstood, both its rise and fall overstated,[5] the academic field has struggled to find a more useful identity than that of a Supreme Court observation post. Despite the recent clear, if half-hearted, reaffirmation of *Miranda v. Arizona*,[6] three decades after Warren's departure the direction of the Court has been straightforward; the police and prosecutor win most of the constitutional cases regarding issues involving the Bill of Rights—issues which were opened up by the Warren Court. For example, the Court has firmly reinforced the trend of granting huge discretionary powers of perception and rationalization to police in *Terry v. Ohio*[7], especially police power to stop and search drivers and their associates.[8] Most of the very subtle permutations of cases establishing the power to stop on reasonable suspicion, to search incident to arrest,[9] and to search vehicles[10]—permutations that were recently thought of as interesting and open questions—have now been settled as well within the range of police power. Somehow it seems beside the point now in addressing these situations to revive what would have been the Justice Brennan or Marshall rhetoric in dissent. Similarly, scholars have now recognized that despite the survival of *Miranda*, American police have found plenty of room "outside" *Miranda* to induce unwarned or uncounseled statements that might prove very useful in prosecutions,[11] or to use subtle but powerful forms of persuasion that manage to stay just on the legal side of *Miranda*'s coercion rules.[12]

Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

5. *E.g.*, Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), the Burger Court (Is It Really So Prosecution Oriented?) and Police Investigatory Practices, in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62 (Vincent Blasi ed., 1983).

6. *See* Dickerson v. United States, 530 U.S. 428 (2000) (reaffirming Miranda v. Arizona, 384 U.S. 436 (1966)).

7. *See* Terry v. Ohio, 392 U.S. 1 (1968) (permitting a stop and frisk of suspects upon reasonable cause to believe crime has been committed or that criminal activity may be "afoot").

8. *See* Wyoming v. Houghton , 526 U.S. 295 (1999) (permitting search of containers owned or possessed by passenger of suspect-driver).

9. *See* New York v. Belton, 453 U.S. 454 (1981).

10. *See* California v. Acevedo, 500 U.S. 565 (1991).

11. *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 154-62 (1998).

12. *Id.* at 158.

Nevertheless, the Warren Court model still abounds in casebooks. Two of the leading publishers issue textbooks which are composed mostly of major Supreme Court cases and have very few notes and questions, much less other case material or non-case material.[13] Most of the other conventional textbooks build their chapters around the major Supreme Court cases as well, with other Supreme Court cases and non-case material coming in only for illustration. The reason is partly the usual one—Supreme Court cases are simply the easiest building blocks. And—let us be honest pedagogues—they are the most "test-able" of material, providing the optimal doctrinal rigor and complexity mix for fair and replicable examination questions. But it is not solely a matter of convenience. For a generation of law students, the Warren Court's major cases—*Terry v. Ohio*,[14] *Miranda v. Arizona*,[15] *Mapp v. Ohio*,[16] and so on—have actually *constituted* the very field of criminal procedure. The field has been defined as whatever the Supreme Court says, due especially to a widespread assumption that the states have chosen not to extend defendants' rights beyond the federal guarantees; rather, relevant state statutes either contain trivial details that are only of local relevance or simply track the federal doctrines.

Miller & Wright refuse to both accept and expand this assumption. They offer instead a unique mix of what one might call "street-level federalism" and local separation-of-powers struggles. Federalism has little to do with the large abstract commerce questions revived in recent years.[17] Rather, Miller & Wright believe that federalism has to do with states treating Supreme Court precedent as a fixity but using state constitutions and state statutes—and even sub-statutory administrative regulations—to provide a deeper level of law to govern courts, prosecutors, and police. As for separation-of-powers doctrine, again Miller & Wright believe that it is not a matter of grand constitutional abstraction, but rather the local government version of systems analysis: dynamic turf battles among police,

13. *See* JEROLD ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION (2000); *see also* LLOYD WEINREB, LEADING CONSTITUTIONAL CASES ON CRIMINAL JUSTICE (2000).

14. 392 U.S. 1 (1968).

15. 384 U.S. 436 (1966).

16. 367 U.S. 643 (1961).

17. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995).

prosecutors, magistrates, and other officials, to work out how discretion in arresting, charging, incarcerating, and bargaining gets exercised.

In the typically case-heavy areas of search-and-seizure and interrogation law, most of Miller & Wright's lead cases are obscure state supreme court cases, and the federal constitutional doctrine comes in through a process of inversion—either the lead case is an explicit application of the federal cases and interprets the federal doctrine in its own text, or the application is indirect or implicit, and the notes to the case then introduce the federal case. The advantages are several: first, we get newer and fresher fact patterns to test the major doctrines; second we get some flavor for how different state courts interpret open Supreme Court doctrine on unresolved issues; third, we see where states use statutes or their own constitutions to alter the federal rules explicitly; and finally, we are spared the often gratuitous exercise of parsing fine differences among Justices' individual opinions—a matter better left to general constitutional law courses. After all, in criminal procedure, the police, line prosecutors, and defense lawyers are the major consumers of the doctrine, and the professorial fascination with opinion-analysis is often irrelevant. At the same time, for those instructors who appreciate Supreme Court doctrine for its generality and consequent test-ability, the Miller & Wright approach is a challenge.[18]

Miller & Wright's approach to *Terry v. Ohio* illustrates the subtle virtues, and perhaps the subtler pedagogic risks, of this approach.[19] *Terry* and its extension in *United States v. Mendenhall*[20] are introduced through a Wyoming case, *Wilson v. State*.[21] In *Wilson*, police encountered a drunken man and, purportedly for reasons of protecting him, detained him briefly. During this time, the police ran his name through a computer data base of arrest warrants. The Wyoming Supreme Court, construing both the federal and state constitutions, held this to be a seizure requiring reasonable cause and thus suppressed all consequent

18. This review does not address, but needs to acknowledge, the very useful supplementary material made available by the editors through a website, http://www.crimpro.com, coordinated with the book.

19. *See* MILLER & WRIGHT, *supra* note 1, at 43-45.

20. 446 U.S. 544 (1980).

21. 874 P.2d 215 (Wyo. 1994).

evidence. *Wilson* thereby becomes a fine example of the consequential meaning of *Terry*: after establishing that suspicion stops and weapon frisks can be done on less than probable cause, *Terry* unleashed into federal law a variety of possibilities for police intervention in special contexts on far lesser justification than would be necessary for an arrest or full search. After all, from drug-testing to immigration checkpoint stops, from administrative searches to schoolroom searches, the courts have found ample help in *Terry* in expanding search-and-detention power.[22] It is only in the background law of the *Wilson* opinion that students first encounter *Terry*; thus, they do so in a context not implicated in *Terry* itself; since in *Wilson*, the police did not do a gun-frisk, nor did they rationalize their action on any inference of imminent criminal activity. So, students must reason inversely to appreciate the original *Terry* doctrine. It is only later in the book that *Terry* itself is offered,[23] and there for the purpose of introducing weapon frisks and suspicion stops. Thus, students will ultimately learn *Terry* in its full breadth, but not in the easily digestible form of other casebooks; furthermore, the instructor must add to the doctrinal toolkit methods for discerning when a state court has gone beyond federal law, and what patterns of extra-federal protection have general practice in the country today.

But Miller & Wright go far beyond even this innovative federalism. Even in the most doctrine-friendly areas, like searches and seizures, they give primary attention to statistical studies and policy memoranda from police and prosecutors, and these become important components of the book. Though constitutional cases cover some important questions, the heart of the matter for Miller & Wright lies in understanding statutory rules, judicial custom, and the raw economics and sociology of criminal justice.

The book starts, strikingly, with material describing the role of the police, and the nature of their caretaking and patrolling assignments.[24] The point to be made is that regular casebooks take a very narrow view of the typical police-citizen confrontation, but Miller & Wright want to show police in their full variety of roles—from social worker

22. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 279-300 (2d ed. 1996).

23. *See* MILLER & WRIGHT, *supra* note 1, at 113.

24. *See id.* at 3-36.

to civility-enforcer. Thus, they illustrate how petty substantive crimes like disturbing the peace or (somewhat less petty) resisting arrest become the rationale for police intervention.[25]

With perfect timing, Miller & Wright included materials on that trendy but vague category of new enforcement methods called "community policing,"[26] including even a lengthy memorandum on community policing by New York and Houston police chief Lee Brown[27], which is a combination of bureaucratic training manual, motivational speech, and policy *apologia*. Moreover, Miller & Wright include state *statutes* on stops and seizures, with several purposes in mind: to cause students to learn the art of statute reading, as opposed to case crunching; to illustrate jurisdictional differences in standards; and also to offer a sort of sociological taxonomy of police-citizen encounters. Thus, a detailed Akron, Ohio ordinance on *Terry* stops[28] serves both as an illustration of the administrative or bureaucratic thinking that must guide individual police, as well as, by more than coincidence, a useful doctrinal summary of the sorts of factors that have been invoked by courts as neither necessary nor sufficient for, but highly relevant to, legitimate searches and seizures.

Thus, Akron police are specifically instructed that a purpose to engage in drug-related activity can be established, for example, when a person "displays physical characteristics of drug intoxication or usage, such as needle tracks, burned or callused thumb and index fingers, underweight, or nervous and excited behavior" or when he "transfers small objects or packages in a furtive fashion."[29] Miller & Wright do not rely on the standard *Terry*-derived profile cases, such as *United States v. Sokolow* or *Florida v. Royer*,[30] where enumeration of neither-necessary-nor-sufficient factors in fractured plurality opinions means that the Supreme Court can offer police no clear guidance. Instead, Miller & Wright offer a documented police profiling instruction chart. Similarly, instead of relying on *Michigan*

25. *See id.* at 4-20.
26. *See id.* at 20-27.
27. *Id.* at 23-26.
28. *Id.* at 66-67.
29. *Id.*
30. 490 U.S. 1 (1989); 460 U.S. 491 (1983).

Dept. of Police v. Sitz,[31] a case involving drunk-driving checkpoints or roadblocks and how these roadblocks work, Miller & Wright introduce actual police memoranda governing the checkpoint procedure.[32]

Miller & Wright reach back into history as well to provide some groundwork on criminal procedure. Instead of the typical brief expository introduction to the colonial background of the Fourth Amendment, they offer the actual texts of the legendary opinions in *Entick v. Carrington* and the *Writs of Assistance* cases.[33] These provide a philosophical motivation for the later warrant requirements. As for warrant requirements, Miller & Wright include forgotten but vital early nineteenth century cases on the need for warrant specificity. Thus, they unearth this striking passage from the ancient case of *Grummon v. Raymond*:

> That this warrant was such as no justice ought to have issued will be admitted; for it is not only a warrant to search for stolen goods supposed to be concealed in a particular place, but it is a warrant to searching all suspected places, stores, shops, and barns in Wilton. Where those suspected places were in Wilton is not pointed out, or by whom suspected.... The officer was also directed to search suspected persons, and arrest them. By whom they were suspected, whether by the justice, the officer, or complainant, is not mentioned; so that every citizen of the United States within the jurisdiction of the justice to try for theft, was liable to be arrested and carried before the justice for trial.[34]

This historical admonition about the venerable reasons for distrusting broad warrants becomes quite contemporary with Miller & Wright's inclusion of a highly original chart listing the actual phrasings of state law criteria for searches and seizures;[35] these remind students that the simple phrases "reasonable cause" or "probable cause" may not fully capture the sort of "articulation" with which local police must justify their actions.

Miller & Wright reach forward as well, introducing a special section on technological searches, grouped into such

---

31. 496 U.S. 444 (1990).

32. *See* MILLER & WRIGHT, *supra* note 1, at 87-93.

33. 95 Eng. Rep. 807 (K.B. 1765); Quincy's Rep. (Mass.) 1:402 (1755).

34. Grummon v. Raymond, 1 Conn. 40 (1814), *reprinted in* MILLER & WRIGHT, *supra* note 1, at 188.

35. MILLER & WRIGHT, *supra* note 1, at 145.

categories as dog sniffs, beepers, infrared sensors, and intelligent vehicle highway systems. They also look at the Fourth Amendment in cyberspace, including FBI Director Freeh's statement on encryption and material on computer hacking and government protection of Internet Service Providers.[36]

Nevertheless, the key to the book remains the below-the-constitutional-radar legal sociology of criminal procedure. In laying out the criteria for search warrant affidavits based on confidential information, Miller & Wright, instead of merely including *Illinois v. Gates*[37] or caselaw derived from it, reproduce an actual "Wanted" poster inviting citizens to identify drug dealers and promising the informants confidentiality, along with a detailed model of a search warrant application.[38] They also include a fascinating Cincinnati police protocol[39] for police use of informants; this provides, for example, that police officers must never give confidential informants internal police operations information, must supervise the informants with rigorous interviewing rules, and must ensure that the informants waive the usual protections under local strip search protocols.

Miller & Wright demonstrate that though constitutional doctrine is often vague and general, police are usually trained to conduct searches and seizures in highly specific categories. Students are urged to look past the general doctrine to the acts. They learn this via Miller & Wright's demonstration that police officers themselves are required to do fine factual "issue spotting." In effect, what we force students to do on exams bears an ironic resemblance to the justifications and articulations that police officers must give to their supervisors and courts to account for their actions. Hence, Miller & Wright excerpt a police memorandum enumerating precise (and graphic) criteria for strip searches and body cavity searches.[40] Similarly, they include a training protocol by which police are instructed to use force in arrests.[41] This remarkable document is a veritable Gray's Anatomy of legitimate and

36. *See id.* at 523-26.
37. 462 U.S. 213 (1983).
38. *See* MILLER & WRIGHT, *supra* note 1, at 163.
39. *See id.* at 767-68.
40. *See id.* at 247-49.
41. *See id.* at 378.

illegitimate body parts for seizure, using Foucaultian vocabulary like "official presence," "verbal control," "physical control," "intermediate weapons," "incapacitating conduct," "pain compliance," and ultimately escalating to permissible deadly force. This matrix makes it far easier for students to understand the issues in a Rodney King-type case.

The material on arrest criteria is enriched by an example of special local guidelines governing arrests in domestic abuse cases, along with a study evaluating the success of the famed Minneapolis experiment, which concluded that arrest was the most effective way to reduce domestic violence.[42] In the chapters on interrogation, beyond the oft-included statistical studies of the effects of *Miranda*, Miller & Wright include material on the unique Alaska rule requiring videotaping of confessions and holding that the requirement amounts to a defendant's statutory right.[43] Similarly, the chapter on identifications admonishes students that most of the "law" of lineups is subconstitutional departmental policy, since the rigorous-appearing requirements of *United States v. Wade*[44] apply only in the rare case of lineups after indictment or arraignment. Therefore, Miller & Wright sensibly focus their identification material on the administrative protocols[45] which were enacted after *Wade* but retained even after *Kirby v. Illinois* essentially nullified *Wade*.[46]

They are also happy to cross the conventional boundary between criminal procedure and substantive criminal law when doing so illuminates police practice; hence, following the introductory material on the "substantive crime" of resisting arrest, they include materials on entrapment doctrine,[47] because it is just as relevant to constraining police procedure as it is to the metaphysics of a defendant's mental state.

Miller & Wright cast the right to counsel in a rich new perspective with some legal realism about who criminal

42. LAWRENCE W. SHERMAN & RICHARD A. BERK, THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT (1984).

43. *See* MILLER & WRIGHT, *supra* note 1, at 673-82.

44. 388 U.S. 218 (1967).

45. *See* MILLER & WRIGHT, *supra* note 1, at 728-29.

46. 406 U.S. 682 (1972) (holding that only the looser due process standard applies to lineups conducted before formal charges are issued).

47. *See* MILLER & WRIGHT, *supra* note 1, at 761-65.

lawyers are and what they are logistically able to do. They link the classic *Powell v. Alabama*[48] case to the sociology of contemporary criminal practice by offering a local example of the specific qualifications a county court sets for appointed counsel.[49] Miller & Wright also include material on defendants' challenges to public defender overloads, the courts' failure to obey statutory requirements for timely payments to defense counsel, and institutional details on contract attorney systems.[50]

As for bail, beyond the typical inclusion of *United States v. Salerno*[51] to introduce pretrial detention, Miller & Wright include material on statutory requirements of consultation with victims,[52] and details on the bureaucratic dynamics of charging decisions, including requirements of face-to-face conversations between police and prosecutors, rather than electronic processes.[53] They offer useful details on local bail "scoring systems,"[54] as many casebooks do, but they also include innovative materials on bail in special contexts—especially domestic violence.

For example, judges of one county in Washington State enacted a policy of denying pretrial release to alleged domestic abusers.[55] The judges not only provoked a petition by the defendant, but they also clashed with police, who claimed statutory authority to set bail in their discretion (and also, by implication, the legislature). Construing state constitutional law and immemorial practice, the Washington Supreme Court concluded that bail-setting was enough of an inherently judicial function to permit reading the statute as allowing the prohibitory policy, and denied that distinguishing domestic abuse from other allegations violated equal protection. This is the sort of street-level tangle of larger separation-of-powers questions that simply cannot get raised by federally-focused casebooks. Though it does not produce testable material in the conventional, uniform way, it certainly permits and enables instructors to devise parallel problems that call on students to replicate

48. 287 U.S. 45 (1932).
49. *See* MILLER & WRIGHT, *supra* note 1, at 866-67.
50. *See id.* at 871-78.
51. 481 U.S. 739 (1987).
52. *See* MILLER & WRIGHT, *supra* note 1, at 933-39.
53. *See id.* at 958-60.
54. *See id.* at 909-16.
55. *See* Westerman v. Cary, 885 P.2d 827 (Wash. 1994).

and criticize the questions of inherent power and institutional competence raised here. Plus, Miller & Wright augment this local caselaw with statistical studies to explore the apparent non-uniformity of bail decisions, concluding that the desire of district attorneys—independent of, and often in the face of, objective evidence of local ties or low severity of charge—determines bail, regardless of the views of others in the system.[56]

The two sections that most exploit the innovative conception of the casebook are the related ones on prosecutorial discretion and plea bargains. Here, Miller & Wright's unique approach to federalism and separation-of-powers pays off the most. The 1996 Anti-Terrorism and Habeas Corpus Reform Act[57] has pulled the jurisdictional rug out from under the decades-long assumption that the true arena for criminal procedure is federal court supervision over state court enforcement of the Fourth, Fifth, and Sixth Amendments. Thus, the Act's ironically salutary effect may be to cause lawmakers and scholars to direct their attention to what may have been the true center of legal action anyway—the exercise of prosecutorial discretion in its broadest sense.[58] Under the Act, Congress, rather than intervene in criminal procedure directly, has more fundamentally, if slyly, reduced the possibility of defendants making constitutional claims.[59] If federal courts can only take state appeals on *habeas corpus* where the

56. *See* MILLER & WRIGHT, *supra* note 1, at 931-37.

57. Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2244-66 (Supp. II 1996)).

58. William Stuntz brilliantly addressed this notion in a recent major article. *See* William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L. J. 1 (1997). Stuntz demonstrates some of the perverse effects of a judicial commitment to court enforcement of constitutional procedural rights as a way to induce fairness in the criminal justice system. Put simply: we chose to add to certain procedural rights without worrying, beyond the minimal guarantee of counsel, about funding defense practice. The result has been an odd skewing of criminal justice systems. Defense lawyers find procedural and non-guilt-addressed claims cheaper to litigate than fact-based claims addressing actual innocence or affirmative defenses. And since it is poor clients who pose the least risk of litigating substantive or factual claims, the state's ability to inflict disproportionate punishment on poor and minority defendants continues unabated. *Id.* at 21, 27-31.

59. *See* 28 U.S.C. § 2254(d)(1) (providing that a habeas petitioner must show that the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law").

state courts have so egregiously misread or misapplied federal constitutional law as to suggest either ignorance or defiance of the Constitution,[60] then the jurisprudence on Bill of Rights issues in which modern scholarship has so invested itself has become a world of only shadow litigation—twice removed from any real effect in state prosecutions. Federal courts will not ask whether state courts are correct, but only whether the most vaguely arguable or colorable bases for their decisions might be found. Hence, the great jurisdictional engine of Warren Court Bill of Rights jurisprudence, having been slowed by a number of key Supreme Court decisions, will have been virtually halted by Congress.

Thus, these days, more than ever, it is prosecutors (in alliance with police, of course), not courts or juries or even legislatures, who do most of the sorting of the guilty and innocent. They may not conduct this screening very well if the risk they face is largely on constitutional issues; and so, despite the traditional liberal romantic attachment to Bill of Rights litigation, concentration on federal constitutional claims may narrow the gap between the odds of convicting the guilty and the odds of convicting the innocent, since innocence of defendants is very poorly correlated with the availability of strong constitutional claims.[61] Moreover, much of the decried racial disproportion in outcomes is due to fact-specific and investigation-demanding matters, such as eyewitness identification, that get under-litigated in a world where defense lawyers find it more economically feasible to litigate search-and-seizure and confession issues. In a final irony, legislation to reduce the funding defense lawyers desperately needed to litigate factual innocence claims is often motivated by political anger over the more symbolically visible defense victories on "technical" constitutional claims.

---

60. *See* Alan Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535 (1999).

61. *See id.* at 606. *See also* William Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998) (Professor Stuntz asserts that there are race-neutral and arguably constitutional reasons why prosecutors are likely to end up prosecuting crimes that are disproportionately committed by black people. It is where black people live disproportionately that police find it most economically efficient to devote resources to arresting drug criminals, and is also in those places that drug crimes tend to be most associated (causally or not) with violent crime).

Regulating prosecutorial discretion in the broader sense, and finding legal constraints on substantive criminal law that do not resemble "judicial legislation"—these are tasks that seem often beyond us. Recent events such as the multifold legal and political reaction to the "Driving While Black" phenomenon,[62] the wide public revulsion at the perceived prosecutorial excesses of the Starr investigation,[63] and related legislative efforts to address wider perceived abuses of non-independent counsel practice[64] may offer some glimmers of hope. The doctrinal consequences following these political phenomena are much less important than the political phenomena themselves: what matters is that American politics has found a politically salient way to take the problem seriously, and we must not be obsessed with the notion that a remedy without a doctrinal tag is ineffective.

---

62. *See, e.g.*, David Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Tracey Maclin, Terry *and Race:* Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998). For years, in this and other areas of criminal procedure, one has heard the occasional argument that administrative rulemaking may solve problems that constitutional litigation cannot. *E.g.*, James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV. L.REV. 1521 (1981); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 10.3. But these calls have been weak for the plausible reason that state agencies cannot always be trusted to monitor themselves. However effective this new burst of rulemaking proves, the fact that it is motivated by very vocal acknowledgements of fault and concern by state officials is itself a huge change. Somehow, the political atmosphere has made it possible for politicians to acknowledge and address this problem without fear of the soft-on-crime label. Most striking is what has just happened in New Jersey. The State Attorney General, as part of, not in spite of, his campaign for the State Supreme Court, issued a report decrying the disproportionate *Terry*-stopping of Black drivers. *See* David Kocieniewski, *Verniero Says Bias Issue Got Lost in Workload*, N.Y. TIMES, Apr. 24, 1999, at B5; Iver Peterson, *Whitman Says Troopers Used Racial Profiling*, N.Y. TIMES, Apr. 21, 1999, at A1.

63. *See* Robert Weisberg, *Foreword: A New Agenda for Criminal Procedure*, 2 BUFF. CRIM. L. REV. 367, 379-80 (1999). The Starr investigation has shown something that has been inherent in modern criminal law all along: the subtle inter-relation of substantive criminal law and procedure. We see this now on the federal front, where the inchoate and verbal nature of modern federal criminal acts permit the less examined procedural doctrines of grand jury and other prosecution subpoena powers to stretch state power to the limit.

64. *See* The Citizen's Protection Act of 1998, Pub. L. No. 105-277 (1998) (codified at 28 U.S.C. §530B(a)) (subjecting U.S. Attorneys to professional and ethical rules of any jurisdiction in which they practice).

The Miller & Wright casebook is an exception to the general rule that American legal scholarship and pedagogy has difficulty breaking out of the Bill of Rights trap. Most casebooks have vague and sparse chapters dealing with the job of prosecutors.[65] Many are very cursory, offering a few pages of exposition on the way that prosecutors' offices are organized and how grand juries work with perhaps one case merely confirming the absence of any constraints on grand jury subpoena power,[66] and a quixotic look at the poor success rate of the efforts to bring constitutional law to bear on selective prosecution.[67] The relentless theme of the few cases presented in most casebooks is that there is effectively no constitutional control of prosecutorial decisions (and so, because the material is thereby untestworthy, many instructors just ignore the whole section of the topic entirely.).

Miller & Wright try something different, presenting true materials on the law, if not the judicial regulation, of prosecutors. With exhaustive illustration of police screening[68] and declination policies, they describe how prosecutors make their most crucial decisions under administrative rules worthy of serious analysis as legal doctrine, and they tempt us with the possibility of bringing prosecutorial discretion into the law, albeit in new and perhaps uncomfortably unfamiliar ways.

The material on charging and declination policy is perhaps the most original in the book, and especially timely in light of the national reaction to the perceived abuses of the Independent Counsel statute and a new bipartisan concern about prosecutorial overreaching. As on other subjects, Miller & Wright treat the guidelines in two ways: first, as administrative regulations which may have no enforceability beyond bureaucratic supervision,[69] and second, as potential statutory rights of defendants under state law. Under these guidelines prosecutions decline because of the size of the loss in property cases[70] or for a

65. *See, e.g.*, JOSHUA DRESSLER & GEORGE THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 794-839 (1999).

66. *See* Costello v. United States, 350 U.S. 359 (1956).

67. *See* United States v. Armstrong, 517 U.S. 456 (1996); United States v. Wayte, 470 U.S. 598 (1985).

68. *See* MILLER & WRIGHT, *supra* note 1, at 956-1004.

69. *See id.* at 963-66.

70. *See id.* at 965.

variety of factors including the antiquity of the law, the availability of an alternate proceeding, the high disproportionate cost of prosecution, the request of the victim, or even the improper motive of the complainant.[71]

We learn from Miller & Wright that well below the constitutional non-doctrine of constraint on discretion, states often take seriously the possibility of judicial enforcement of declination and diversion policies against prosecutors.[72] Thus, the court can invalidate a prosecutor's blanket decision to refuse pretrial diversion for a whole subclass of drug defendants, and the abuse of discretion standard can be applied to a prosecutor as it can to an agency head or lower court.[73] For example, the Florida state guidelines on use of habitual offender laws[74] look like a formal statute in offering a taxonomy of classes and specific sections for felonies so chargeable, or specified combinations of crimes, such as number of priors and identity of new crime. Only at the end of this section do Miller & Wright include the almost obligatory *United States v. Armstrong*[75] and other conventional material on the almost non-existent federal constitutional oversight of prosecutorial discretion.

Moreover, in the chapter on guilty pleas, Miller & Wright give new vitality to the abstract notion of separation-of-powers in the trenches of criminal justice. It is interesting to see a higher court tell a lower court that it cannot set rigid policies in rejecting certain types of plea bargains,[76] but it is fascinating to note that in some states the courts can treat the prosecutors the same way—imposing at least an abuse-of-discretion standard on prosecutorial decisions to impose enhancements and causing prosecutors to impose administrative guidelines on themselves.[77]

---

71. *See id.* at 968-69.

72. *See* State v. Krotzer, 548 N.W.2d 252 (Minn. 1996) (holding that, in extraordinary circumstances, such as where statutory rape defendant has no criminal record, victim's family urges no prosecution, and required sex offender registration would be unduly punitive, court may dismiss charge for prosecutor's abuse of power to charge).

73. *See* State v. Baynes, 690 A.2d 594 (N.J. 1997).

74. MILLER & WRIGHT, *supra* note 1, at 1002-04.

75. 517 U.S. 456 (1996).

76. *See, e.g.*, Espinoza v. Martin, 894 P.2d 688 (Ariz. 1995) (holding that lower courts cannot categorically prohibit negotiated sentencing stipulations).

77. *See* State v. Lagares, 601 A.2d 698 (N.J. 1992) (holding that a court has the power to force a prosecutor to adopt administrative guidelines for invocation

But the boldest aspect of this section is its inclusion of bureaucratic history and turf-battling political science: the sequence of Justice Department memoranda on plea bargains preceding and following the enactment of the Sentencing Guidelines. The sequence begins pre-Guidelines with the 1980 Principles of Prosecution,[78] exemplifying the fairly open discretionary system in which prosecutors were not held accountable in any formal way to justify plea bargains so long as individual judges did not object. Then, after the 1984 Sentencing Reform Act, which created the Guidelines, we have the complex 1987 Weld Redbook.[79] This document recognizes that the Guidelines restrict charge bargaining through the "adequately reflect the seriousness" requirement. The Weld Redbook also notes that the Guidelines affect sentencing bargains even more by drastically constraining the use of governmental sentencing recommendations, while also creating a new phenomenon of "fact bargaining." Sentences must now conform to the Guidelines, with some allowance for specified departures and reductions for "substantial assistance" where there are "justifiable reasons."[80] The key insight here is that the Weld Redbook imposes even greater constraints than the Guidelines themselves, taking the remarkable legal position that the Commission's own policy statements on this subject clash with the language and intent of the 1984 Sentencing Reform Act. The Justice Department thus opposed—and declined the invitation to use—the greater breadth afforded by the "justifiable reasons" factor.[81] Moreover, the Redbook admonishes line prosecutors not to take undue advantage of "fact bargaining" by disingenuously relaxing their investigatory efforts so as to be able to make straight-face claims to judges that certain facts are unprovable, and hence certain concessions are legitimate.[82]

Was the Justice Department sincerely reading the statute? Was it implicitly rebuking the Commission for failing to recognize the intra-executive problem it had

---

of sentencing enhancements for drug offenders, even where there is no stautory limit on the prosecutor's discretion).

78. MILLER & WRIGHT, *supra* note 1, at 1295-97.

79. *Id.* at 1299-1300.

80. U.S. SENTENCING GUIDELINES MANUAL §§6B1.2, 6B1.4 (1999).

81. *See* MILLER & WRIGHT, *supra* note 1, at 1300-1303.

82. *See id.* at 1303.

created? Students now must confront an unexpected wrinkle in the separation-of-powers problem: the intra-executive conflict between the Justice Department, seeking some semblance of national uniformity in pleas and sentences, and line United States Attorneys, who naturally want to maximize their autonomy.[83] The 1989 Thornburgh Bluesheet and the 1992 Terwilliger Bluesheet[84] both enhance this centralized uniformity by tightening up substantive standards, especially in regard to fact bargaining, and stressing recordkeeping and internal review. However, the 1993 Reno Bluesheet[85] appears to go the other way – decentralizing power back to line attorneys in a manner reminiscent of 1980, and we learn that this odd reversion may reflect yet another institutional conflict: the Justice Department was shoring up the power of United States Attorneys in the face of congressional rebukes over allegedly lenient sentencing.[86]

This is not legal doctrine in any conventional casebook sense, but it poses the same analytic challenges for students—they must understand the tension between rules and standards, argue policy and institutional competence, and hypothesize arguments from explicit and customary authority. Indeed, it can even produce testable questions, if instructors are willing to accede to this unusual context (and take advantage of the many hypo-problems the editors insert to guide the teaching).

To return to more generic local problems of guilty pleas, it is useful to remind students that prosecutors often consult with and defer to victims or victims' families in deciding whether to make a plea deal, but it is eye-opening to learn that a state court may treat this practice as a dereliction of statutory duty.[87] Most casebooks cite the general principle that a guilty plea must be knowing and

83. *See id.* at 1300-03.

84. *Id.* at 1303-05.

85. *Id.* at 1306.

86. *See id.* at 1307.

87. *See* State v. McDonnell, 837 P.2d 941 (Or. 1992). In this case, the prosecutor assumed that the family of the murder victim would approve the guilty plea to a life sentence; but the family refused, and the defendant complained that the prosecutor wrongly gave the family full power to control the plea. The court held that the prosecutor had contemplated a capital charge anyway and had consulted family only on the chance that the family wanted a plea bargain, so there was no violation of prosecutor's statutory duty that prejudiced defendant.

voluntary, and perhaps offer an example of where a defendant's misinformation about a sentencing consequence is material enough to undermine his plea,[88] but none, so far as I know, has offered cases where defendants and prosecutors joust with each other about whether they were materially misinformed about the evidence before committing to a deal.[89] Most casebooks mention that judges are discouraged from participating in plea bargains, but in Miller & Wright's casebook, we see at what point that involvement might undo the plea.[90] Finally, separation-of-powers and federalism take on street-level significance when a state court confronts an almost insoluble problem of rescission.[91]

I will make some brief observations about some of the other chapters, beginning with jury challenges. In the area of juror selection, before the unavoidable treatment of discriminatory peremptories in *Batson v. Kentucky*[92] and post-*Batson* cases, Miller & Wright include unusual but very refreshing material on a logically prior issue: the circumstances under which lawyers can use challenge for cause to dismiss jurors for racial bias[93]—an excellent corrective to the great modern stress on peremptories. And though most criminal law teachers at some point in their courses casually mention *Allen v. United States* or dynamite

88. *See, e.g.*, State v. Ross, 916 P.2d 405 (Wash. 1996) (distinguishing "direct and immediate" from more contingent consequences).

89. *Compare* State v. LaForest, 665 A.2d 1083 (N.H. 1995) (holding that a court may enforce a plea where the defendant waived his discovery right to interview the victim, and the plea offer was to be withdrawn if defendant attempted discovery), *with* State v. Rivest, 316 N.W.2d 395 (Wis. 1982) (holding that a prosecutor may rescind a plea offer where the defendant falsely described his minor involvement in a crime, and a second team of police investigators, after a guilty plea, discovered that defendant had misled police).

90. *See, e.g.*, State v. Wakefield, 925 P.2d 183 (Wash. 1996) (concerning illegal judicial involvement in a plea where the judge accepted a plea with an implied promise of a mid-level sentence and then gave the maximum sentence).

91. *See* MILLER & WRIGHT, *supra* note 1, at 1356. Miller & Wright here include *State v. Parker*, 640 A.2d 1104 (Md. 1994). Parker had been convicted on state and federal charges for bank robbery; he pleaded guilty in state court under a deal that contemplated that he could serve his state sentence in federal prison (a safer venue for informers), but, ironically, he was paroled by the federal authorities and hence left to return to state prison. Recognizing that it had no power to force the federal prison to re-accept him, the state court gave him the choice between serving the sentence in state prison or rescinding the original plea, and facing retrial years after the original case.

92. 476 U.S. 79 (1986).

93. *See* MILLER & WRIGHT, *supra* note 1, at 1408-21.

charges, Miller & Wright actually include the doctrine itself.[94]

Miller & Wright's treatment of lawyer ethics is not extensive. Instead of relying, as most books do, chiefly on *Nix v. Whiteside*,[95] they look to the subtler questions of ethics and discovery, such as a lawyer's role in sting operations or in threats of criminal charges.[96]

It is almost impossible to discuss sentencing in casebooks. The effort is made in both procedure and substantive criminal law books, and the problem, of course, is the absence of what is conventionally thought of as law or doctrine which students can learn. After all, what law is there to teach? The choice lies between broad themes and methodologies on the one hand, and highly specific rules and varied structures on the other. It may well be that few teachers will ever touch this material out of either lack of time, or concern that there is no teachable or testable material in the area. Miller & Wright, though themselves prominent scholars of the federal sentencing guidelines, tread lightly in this area. They finesse the categorical change in sentencing wrought by both state and federal guidelines by attempting a unified, thematic approach. Thus, their key example of the general "methodology" of sentencing is the Oliver North case,[97] which is pre-Guidelines. One special innovation merits note here—in line with their willingness to use substantive criminal law doctrine to illuminate police procedure, they are surely the first casebook editors to introduce the bizarre phenomenon of federal "sentencing entrapment" as a defense.[98]

The book does have its flaws. It has surprisingly little material on Fourth Amendment tort suits and administrative remedies.[99] If Miller & Wright's position is that these suits are futile and that their availability is an empty symbol, they might well have offered far more detailed empirical evidence for this, especially in light of

94. *See id.* at 1458-65. (including Bailey v. State, 669 N.E.2d 972 (Ind. 1996) (citing Allen v. United States, 164 U.S. 492 (1896))).

95. 475 U.S. 157 (1986) (holding that a defense lawyer may not assist client in presenting false evidence).

96. *See* MILLER & WRIGHT, *supra* note 1, at 1588-99.

97. *Id.* at 1608-11.

98. *See* MILLER & WRIGHT, *supra* note 1, at 1645-50.

99. *See id.* at 430-49.

their commitment in other chapters to lay out the socio-dynamics of criminal justice.

The matter of effective assistance of counsel is a more complicated case for criticism. Miller & Wright offer a surprisingly generic treatment of *Strickland v. Washington*,[100] with nothing on the sociology of case-specific ineffectiveness. Yet they compensate with some rarely noted state caselaw on the limited state-supplied right of counsel in civil DWI cases and other civil deprivations.[101]

The chapter on discovery is also not as complete as it could be. Casebooks always use *Brady v. Maryland*,[102] or its progeny, *United States v. Agurs*[103] or *United States v. Bagley*,[104] to illustrate the limited constitutional due process right of defense discovery of exculpatory evidence. Casebooks also use *Williams v. Florida*[105] to show where prosecution discovery of defense alibi claims does not infringe the privilege against self-incrimination. But most of discovery doctrine in Miller & Wright's casebook lies in the devilish details covered only by statutory, administrative, or purely discretionary guidelines. Miller & Wright are surprisingly under-responsive to this problem, taking the conventional approach of front-loading the constitutional issues and covering rules and local practices mainly as an afterthought.

Nevertheless, the achievements of the book are prodigious, and the challenge to instructors is clear. Miller & Wright make a good case for the possibility of teaching the real practice of criminal justice while still providing enough of a legalistic framework for students to exercise all the usual lawyerly and analytic skills. Indeed, if cast in terms of federalism and separation-of-powers analysis, the book can be justified as being even truer to Supreme Court doctrine than the conventions of pure Supreme Court jurisprudence.

100. 466 U.S. 668 (1984).
101. *See* MILLER & WRIGHT, *supra* note 1, at 831.
102. 373 U.S. 83 (1963).
103. 427 U.S. 97 (1976).
104. 473 U.S. 667 (1985).
105. 399 U.S. 78 (1970).